Office - Supreme Court, U.S.
FILED
SEP 28
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 179

IN THE MATTER OF
GRANADA APARTMENTS, INC.,
DEBTOR.

WEIGHTSTILL WOODS, COURT TRUSTEE,
Petitioner,

vs.

THE ARLINGTON, INC.,
Respondent.

REPLY BY PETITIONER TO THE ANSWER.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 179.

IN THE MATTER OF
GRANADA APARTMENTS, INC.,
DEBTOR.

WEIGHTSTILL WOODS, COURT TRUSTEE,
Petitioner,

vs.

THE ARLINGTON, INC.,
Respondent.

REPLY BY PETITIONER TO THE ANSWER.

The Reasons Assigned by the Court Trustee's Petition for the Allowance of the Writ, Are Sufficient Under Rule 38 of This Court.

Respondent merely states the opposite contention on the last page of its answer. Rule 38 says that the reasons suggested therein for the granting of certiorari are "neither controlling nor fully measuring the court's discretion." The reasons stated by the petition are more than sufficient, falling as they do within the rule's illustrations.

These "Reasons Relied Upon" by the petition are:

(1) That important federal questions which have not been but should be decided by the Supreme Court under Rule 38-5(b) are involved.

Reason (a) at page 19 presents the question of the consolidation of records and the interpretation of Rule 75 of the Rules of Civil Procedure. (See second paragraph of Conclusion at page 20.)

Reasons (b) and (c) at page 19 present the interpretation and application of Rule 52 of the Rules of Civil Procedure.

Reason (d) at page 19 opposes the granting of affirmative relief to an appellee who has filed no cross appeal (respondent).

(2) That the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision under Rule 38-5(b).

Reason (e) at page 20 stated that the Circuit Court of Appeals had reversed *all* findings of fact including those which were uncontested by the pleadings and proofs.

Paragraph three of the Conclusion at pages 20-21 of the petition states that this is a situation which "calls for the corrective influence of the Supreme Court of the United States."

In Its Motions for Consolidation of Cases and Records, the Respondent at No Time Stated Any of the Jurisdictional Facts Which, Under Rule 75(h) of the Rules of Civil Procedure, Would Have Invoked the Circuit Court of Appeals to Incorporate Into This Case Any Matter Which Had Not Been Designated by the Praecipe.

Petitioner regards as immaterial the question whether or not a Circuit Court of Appeals had the "inherent right" *prior* to "the enactment of the Rules of Civil Procedure",

to have certified up or to consolidate in the record any matters which are not designated by the praecipes of the parties. After the Rules of Civil Procedure have been promulgated in 1938, and since they contain Rule 75(h), that rule is exclusive. The rule ends such power, if it did exist at a prior time. Rule 75(h) is quoted in full at page 17 of the petition for certiorari. The rule expressly states that the court may direct the certification of a "supplemental record", "if anything material to either party is omitted from the record on appeal by ERROR OR ACCIDENT."

In neither of its two motions did respondent ever state or claim that anything had been omitted "by error or accident". They never asked for a "supplemental record". These two motions are to be found at pages 69-71 and pages 75-77 of the printed record. Likewise, the order thereon by the court (PR. 82) does not state that any matter had been omitted "by error or accident" nor does it order any "supplemental record".

Thus the reason for the application of Rule 75(h) (error or accident) was not present. The court order is void for want of jurisdictiton to grant the motion of respondents, in the absence of an allegation pursuant to rule to invoke the power. The motion has no record foundation. The order is an usurpation of power.

In its answer (page 6) the respondent now suggests that there was "error or inadvertence" in its failure to designate the full record. Such a suggestion was never made before now. The statement found at paragraph three on page 6 of respondent's answer, serves no proper purpose. It is an attempt to mislead this court.

The power of a Court of Appeals under Rule 75(h) to enter such an order as it here did, is one question

presented (Principal Questions Presented, I, page 16 of Petition), and one Reason Relied Upon for the issuance of a writ of certiorari by this court (Reasons Relied Upon, (I), page 19 of Petition). It is an important question which has not yet been decided by this court. Petitioner submits that the Court of Appeals committed primary error in entering the order complained about. (PR. 82.)

The answer by the respondent Arlington, Inc., both expressly and by omitting to challenge the petition, admits that many of the issues herein are to be resolved as the petitioner has shown and asked by his petition.

First Admission by Answer.

Pleading for Arlington did not deny that City National, without disclosing and while acting as dual agent and trustee, had altered Granada's financial records, by an entry which charged off therefrom a $4,080 credit due to Granada from Arlington.

The petition for certiorari at page 9 states:

> "The brief of respondent, Arlington, Inc., (in the Circuit Court of Appeals) did not deny such charges or findings."

The findings by the District Court thus referred to (R. 56, PR. 45), are that a balance of $4,080 due to Granada from Arlington had been "charged off" by City National, the trustee of both Granada and Arlington.

Arlington still does not deny this faithless conduct of the dual trustee, nor deny the benefit received by Arlington from that untrustworthy act. All that Arlington says in its answer is: (p. 9.)

> "There is not a scintilla of evidence that the Indenture Trustee charged off on the books of the Granada a credit of $4,080."

Arlington does not deny that it was done. It only says that there was *no evidence* that this was done. Having been admitted and confessed both before the District Court and the Circuit Court of Appeals by failure to raise an issue by pleading, it seems difficult to believe that respondent's answer, that "there is not a scintilla of evidence" to prove it, can avail. The failure by respondent to answer by its pleading, is a complete admission of the charge directly made, and dispenses with all need for evidence or proof. When defensive pleading is absent, we have no need to examine the evidence in the trial record. Fact findings by the District Court are firmly and sufficiently supported by the pleadings alone.

Second Admission by Answer.

That the Circuit Court of Appeals executed its erroneous order and used the PRINTED *record from appeals* 6986 *and* 7060 *instead of the record proper to this appeal* 7086.

At page 12 of their answer, respondent admits that the Circuit Court of Appeals used the printed record from other appeals, when they say:

> "That evidence as shown by the certificate of the Clerk at Record 65, was before the Court of Appeals in printed narrative form in the matter of the main appeals 6986 and 7060, which were heard at the same time. It is contained in the *printed* volumes I and II which accompanied the separate petition for certiorari filed by the Court Trustee June 25, 1940 docketed here as numbers 281-282." (Italics ours.)

The Opinion by the Circuit Court of Appeals likewise admits that it used the printed record from other appeals. That portion of the Opinion which so admits (PR. 98) was conveniently quoted at Page 8 of answer by respondent, as follows:

> "The argument here on behalf of the Court Trustee is predicated upon the same findings of fact (so

> far as material) as those upon which it was sought to hold City National liable. We have concluded those findings were without substantial support (on the basis of the *Printed* Record used in that case), and for that reason City National should not be required to account in this matter. We also conclude that there is no liability on the part of Arlington, Inc."

Respondent then significantly adds:

> "This after reading, re-reading and searching THE RECORD with a view of endeavoring to ascertain if the trial court's findings were in any way supported. (R. 87.)" (Emphasis ours.)

How improper the use of this printed record was, is shown by the order of the Circuit Court of Appeals which states (PR. 82):

> "It is ordered by the Court that the motion of counsel for appellee The Arlington, Inc., for reconsideration of its motion heretofore made for consolidation and other matters therein mentioned and to reconsider also the order denying said motion, be and it is hereby, denied.
>
> " * * * * * *
>
> "It is further ordered that the transcript of evidence contained in the consolidated record in causes Nos. 6986 and 7060 be incorporated in the record in this cause, and that said transcript of evidence *need not be printed* (in this cause), but that it may be referred to by the parties herein." (Italics ours.)

Thus we see that the only record referred to in the order was the *unprinted transcript* as certified in causes 6986 and 7060. This is the only "record" which petitioner was given notice would be used by either court or counsel. Such use of the *printed* narrative of evidence then was a denial of *notice or hearing* and as such a denial of due process under the Fifth Amendment to the Constitution of the United States. As shown in the motion filed September 16, 1940, in causes 281-282 (to review 6986 and 7060) the narrative printed in 6986 and 7060

was prepared by counsel for respondent, and never filed with the clerk in the Circuit Court of Appeals.

The purport of this order of the Circuit Court of Appeals is fully admitted by respondent. At page 5 of their answer the following is stated:

> "And it is true that at an early stage, without further knowledge, the Court of Appeals denied the motion to consolidate, but the statement at page 7 of the Court Trustee's brief that on November 27, 1939, the Court of Appeals ordered that both parties might refer to the record of the other appeal cases, while literally true is quite inadequate and misleading, for the fact it that the COURT OF APPEALS ORDERED THAT THE TRANSCRIPT OF EVIDENCE ABOVE MENTIONED *be incorporated as part of the record* on the Court Trustee's appeal in this Arlington matter (R. 82)." (Emphasis ours.) (Italics not ours.)

The only record which was ever before the Circuit Court of Appeals pursuant to the federal rules, was the record designated by this petitioner in his praecipe, dated August 22, 1939. (PR. 62-63.) That record is now before Your Honors, in the printed transcript that was certified June 25, 1940. (PR. 65.)

The Answer Fails to Challenge That the Court of Appeals Consolidated the Transcript of Records in (1) Different Appeals from (2) Separate Judgments Between (3) Different Parties.

That is exactly what the Court of Appeals did. As to (1) the different appeals, it cannot be denied that this Arlington case was docketed as appeal 7086 in the Circuit Court of Appeals while the other cases were docketed as appeals 6986 and 7060 and 7061.

As to (2) separate judgments, it cannot be denied that the judgment of the District Court in the Arlington case was entered on June 20, 1939 (R. 70-71, PR. 59-60), and is a different judgment than that entered by that court al-

most two months earlier in the other cases (Nos. 281-282, R. 424-426, PR. 794-795).

As to (3) different parties, it cannot be said that Arlington was ever a party to the other appeals (6986-7060 and 7061 in C. C. A.), but on the contrary a *different party* from those participating in the other appeals.

Respondent fully knows these facts; knows that these simple facts exist as stated by petitioner; and are not debatable.

Respondent has admitted in its answer that the subject matter, issues and personnel of the various suits were not the same. At pages 1 and 2 of its answer filed in this cause in this court it has stated:

> "City National * * * filed its report and account and also its claim * * *. The Court Trustee objected to the claim (NOT HERE IN ISSUE), and counterclaimed for substantial amounts asserted to be due by reason of the Indenture Trustee's wrongful operation of the property (AGAIN NOT HERE IN ISSUE). Thereafter the Court Trustee filed his petition against The Arlington, Inc. (IN NO WAY IDENTIFIED WITH THE DEBTOR CORPORATION, GRANADA APARTMENTS, INC.), to recover amounts to be due * * *." (Emphasis ours.)

Thus we see, by respondent's answer, that the subject matter, issues and personnel of the appeals from the District Court are not the same.

Respondent also, at Page 4 of its answer, re-admits the basic contentions of petitioner and extends its prior admission by stating:

> "The findings of May 2, 1939 referred to at Page 5 of the petition here, when made, *were not intended to have anything whatsoever to do with the issues arising under the petition of the Court Trustee against The Arlington, Inc.*"

The respondent then states that these earlier findings were incorporated into the Arlington order entered about two months later.

Respondent Fails to Challenge the Liability for Discontinuation of Services, Which Was Raised in the Court Trustee's Original Petition, in the District Court and Was Further Raised by Other Pleadings from Time to Time.

Respondent's answer attempts to persuade Your Honors that the petition for certiorari contains statements which are not reliable. One example of this attack upon accuracy of the petition is the following paragraph at Page 3 of respondent's answer.

> "It is quite untrue that the question of discontinuing the services was raised in the above petition and answer or that it was further raised by other pleadings from time to time as averred by the Court Trustee."

This quoted statement is a complete departure from the facts and record.

The original petition by this Court Trustee, filed September 14, 1937 asked (R. 5; PR. 4):

> (3) That the Court determine and decree what sum is due from Arlington, Inc., for said services to date; and also *determine and decree whether said services shall be continued* * * *." (Italics ours.)

The answer of Arlington, Inc., filed September 18, 1937 prayed (R. 12; PR. 10-11):

> "that the Court * * * direct the continuation of such service by the Trustee until the completion of said plant."

On December 3, 1937 a petition was filed by Arlington, Inc. (R. 15-16; PR. 11-12), asking the court to order Granada,

> "to desist from furnishing steam and hot and cold water to the premises of petitioner."

From these pleadings in the record, Your Honors will determine whether as stated "the question of discontinuing the services was raised in the petition and was further raised by other pleadings from time to time." Similar

denials of other simple truths are to be found throughout respondent's answer.

The question of discontinuation of services having been properly raised by the pleadings of the parties, that matter was before the District Court (PR. 21):

> "And it appearing to the Court from said petition that the Arlington, Inc., desires to cease taking from the Granada said steam and hot and cold water, but that neither the Trustee in Bankruptcy nor Granada Apartments Hotel Corporation concedes or admits its right so to do; and that the Court cannot presently adjudicate or determine its right so to do."

After respondent refused on December 10, 1937, to receive further services from Granada, the court made appropriate findings. One of these findings (Par. 43 at PR. 46) concluded as follows:

> "After trial of this suit, Arlington, Inc. has refused to receive services under said contract (the Barton Contract) since December 10, 1937; Arlington, Inc. is officered and controlled by City National employees, who have done this additional wrong to Granada."

Another finding (Par. 53 at PR. 51) stated that there had been a

> "wilful cut off of pipes by respondents and refusal further to receive the services after December 10, 1937 * * *."

Respondent Fails to Challenge That City National Bank and Trust Company Acted in the Dual and Conflicting Capacity of Trustee for Arlington.

The answer of respondent upon this subject is evasive. It neither denies nor admits the conflicting trust relationship.

The answer made to the charge is that the petition of the Court Trustee against Arlington, Inc., merely recited portions of the claim filed against City National and that there-

fore Arlington was not bound to answer the charges of duplicitious conduct. It is interesting to note however, that when the District Court found that such an unfaithful and duplicitious trusteeship did exist, that Arlington did not deny that finding by any pleading in this or any other record.

Since respondent persists in its attempt to mix the three cases (Nos. 179, 281-282, and 310) into one hodge podge and further asserts at page 12 of its answer that,

> "Reference to the printed record docketed here as 281 and 282 will show that the very findings on which the Court Trustee relies were appealed from"

it should be noted that the Assignment of Errors in that case (281-282, PR. 817-832) does not contest or deny the following portion of Paragraph 49 of the District Court's Findings (PR. 49-50):

> "From that time (May 1929) until now these properties (Granada, Arlington and Lincoln Park Manor) were bondholders equities. No person in a confidential relationship to one of these properties could rightfully represent another."

That part of the finding is conclusive. It was never appealed from or assigned as error at any time in any of the appeals from the District Court.

It then follows that City National could not "rightfully represent" both Arlington and Granada either as agent or trustee since both the principal-agent and trustee-*cestui* relationships are highly confidential and permit of no double dealing. In the face of the failure of both City National and Arlington, Inc. to assign error, this fact stands of record admitted by respondent.

Respondent Failed to Challenge That as a Matter of Law If City National Became the Agent or Trustee of Arlington Without the Knowledge and Consent of Granada (Its Principal) and Undertook by New Contract to Bind Granada to Supply Services to Arlington for a Reduced Consideration, That Then Arlington Is Bound by the Prior Barton Contract to Pay the Reasonable Value, the New Contract Being Null and Void.

At Page 9 of its answer the respondent asks "so what?" saying:

> "But suppose that it were true that City National Bank and Trust Company, while mortgagee in possession after condition broken of the Granada, reduced the rates at which the Granada was to service the Arlington, and did so in breach of its trust as far as the Granada was concerned. How would that make The Arlington, Inc., liable to pay any more than it had contracted to pay City National Bank and Trust Company of Chicago, as mortgagee in possession of the Granada?"

In Illinois this question is easily answered. In *Metcalf* v. *Metcalf*, 286 Ill. App. 10, 2 N. E. (2d) 760 (1936), there was a somewhat similar breach of trust by a trustee. The Court said:

> "If, without the knowledge and consent of his principal, the agent becomes the agent of the opposite party as well and undertakes by contract to bind his original principal, the law deems the original principal in that transaction to be practically unrepresented, and any bargain in his name or any act done on his account is usually voidable at his option. *Lerk* v. *McCabe*, 349 Ill. 348, 182 N. E. 388. The principal need not show himself injured, and his right to repudiate the transaction is not affected even by the good faith of the opposite party. *Chicago Title and Trust Company* v. *Schwartz*, 339 Ill. 184, 171 N. E. 169."

Thus this case and the two Illinois Supreme Court cases therein cited present the perfect answer to the "so what"

query of respondent. The contract relied upon by the respondent was executed by the multihanded trustee of Granada. That same trustee who was the agent of Granada for the purpose of selling the services was also the agent and trustee of Arlington for the purpose of purchasing those services. The party of the first part was represented by the same agent that represented the party of the second part. There was no disclosure made of this dual representation. It was a behind the scenes transaction. It was a void transaction. The respondent is relying upon a void contract. Under such circumstances the only valid and subsisting contract between the parties was the Barton Contract (R. 26-30, PR. 17-21), which had been executed and continued by the predecessor parties, prior to the entry of City National into the trusteeships of Granada and Arlington. This was a simple proposition of law. It should have been admitted by respondent.

Respondent Failed to Challenge That the Circuit Court of Appeals in Its Option Overlooked and Ignored the Barton Contract.

The method used by the respondent, in asserting that the Circuit Court of Appeals considered the Barton Contract, is unusual. The trail of logic is narrow and difficult to follow. The respondent says that the Circuit Court of Appeals must have considered the Barton Contract because they ruled that an arrangement set up by City National was in force. That is complete *non sequitur*.

Of course the respondent could not cite any part of the Opinion which mentions the Barton Contract. But such an omission did not cause the respondent to hesitate. It sought to deny the court's omission. But its efforts merely bring out in broad relief the fact of that omission. Petitioner submits that the omission of the Barton Contract from

consideration by the Court of Appeals, should have been admitted frankly by the respondent.

In Conclusion.

This petitioner in closing affirms that all matters contained in his original petition are true, and that in his opinion they constitute sufficient cause why Your Honors should grant the writ of certiorari as prayed for in that original petition. Petitioner further states that there are pending before Your Honors other "Granada" petitions for certiorari to which the present respondent is not a party. The respondents to said separate petitions are represented by the same counsel, who appears for the respondent Arlington, Inc. These two other petitions have been docketed as causes Nos. 281-282 and 310. Petitioner states that the cumulative effect of these three petitions and the disclosures contained therein is such as to call for the granting of this petition and the others, so that law shall be equal and that justice may prevail.

WHEREFORE, the petitioner renews his Prayer for Relief and asks that the Writ of Certiorari be issued.

WEIGHTSTILL WOODS,
Attorney for Petitioner.

Office - Supreme Court, U. S.
FILED
AUG 1 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 179

IN THE MATTER OF GRANADA APARTMENTS, INC.,
DEBTOR.

WEIGHTSTILL WOODS, COURT TRUSTEE,
Petitioner,

vs.

THE ARLINGTON, INC.,
Respondent.

ANSWER OF THE ARLINGTON, INC., TO THE PETITION FOR WRIT OF CERTIORARI.

VINCENT O'BRIEN,
JOHN MERRILL BAKER,
TRACY WILSON BUCKINGHAM,
Counsel for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

SUBJECT INDEX.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 179

IN THE MATTER OF GRANADA APARTMENTS, INC.,
DEBTOR.

WEIGHTSTILL WOODS, COURT TRUSTEE,
Petitioner,

vs.

THE ARLINGTON, INC.,
Respondent.

ANSWER OF THE ARLINGTON, INC., TO THE PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Justices of the Supreme Court of the United States:

For purposes of answer we shall follow the outline contained at page 3, *et seq.*, of the petition.

SUMMARY OF THE MATTER INVOLVED.

I.

IN THE TRIAL COURT.

The statement made by the Trustee in Bankruptcy under this heading is inadequate, inaccurate, and misleading.

In these 77B proceedings Weightstill Woods was appointed Temporary Trustee. City National Bank and

Trust Company, the Indenture Trustee, which had been in possession of the property of Granada Apartments, Inc., as mortgagee in possession after condition broken, on the approval of the petititon surrendered possession and filed its report and account and also its claim predicated on the state court decree of sale entered in the foreclosure proceeding, which established its fees, costs and charges and those of its counsel secured by the lien of the trust deed prior to its lien as security for the payment of bonds and coupons. The Court Trustee objected to the claim (not here in issue) and counterclaimed for substantial amounts asserted to be due by reason of the Indenture Trustee's wrongful operation of the property (again not here in issue). Thereafter the Court Trustee filed his petition against The Arlington, Inc. (in no way identified with the Debtor corporation, Granada Apartments, Inc.) to recover amounts alleged to be due from The Arlington, Inc. for heat, hot and cold water, and refrigeration furnished to it by Granada Apartments, Inc.

That petition did not set forth as averred by the petitioner here "that $1,000 per month was and is a reasonable charge for said services to be paid by the Arlington property, earned and due to Debtor estate." The averment was that on September 9, 1937 the Court Trustee had made that allegation in an answer and counterclaim filed in respect of the petition of City National Bank and Trust Company (R. 2). Nor did the petition against The Arlington, Inc., allege that City National Bank and Trust Company of Chicago acted "in the dual and conflicting capacity of trustee in possession" or that "prior to 1933 for many years the sum charged and paid was $940.00 or more per month," etc., but again, in so far as the petition against The Arlington, Inc. was concerned, the averment was merely that on September 9, 1937 the Court Trustee filed an answer and counterclaim in respect of

the petition of City National Bank and Trust Company, in which answer and counterclaim the above statements were contained (R. 3).

It is true that City National Bank and Trust Company filed no answer to the petition against The Arlington, Inc., for that petition prayed no relief against City National Bank and Trust Company (R. 2-4).

It is true that The Arlington, Inc., answered the petition and said that the payments to the Granada for such services were more than fair. It is likewise true that the answer did not deny the alleged dual and conflicting trusteeship of City National Bank and Trust Company, for the reason that there was no such allegation, as above noted.

It is quite untrue that the question of discontinuing the services was raised in the above petition and answer or that it was further raised by other pleadings from time to time as averred by the Court Trustee.

The fact is that the report and account of the City National Bank and Trust Company as Indenture Trustee and its claim and the objections and counterclaim of the Trustee in Bankruptcy, and the petition of the Trustee in Bankruptcy against The Arlington, Inc., were all heard at the same time by the District Court and the entire evidence was taken and considered in respect of the issues so raised. At the conclusion of that hearing the trial court certified the report of proceedings or transcript of evidence which has been sent here in four volumes, not printed, although the certificate of the Clerk of the Circuit Court of Appeals shows them to be part of the record in this case (R. 65).

Some time after the hearing The Arlington, Inc., having installed its own plant and wishing to cut off service but not wishing to interfere with the Court Trustee's pos-

session, petitioned the District Court for directions to the Court Trustee to cut off service, which petition the Court Trustee answered as of December 6, 1937. Notwithstanding the answer, the trial court directed the service to be cut off without prejudice (R. 21). These matters, however, form no part of the proceedings taken under advisement in relation to the consolidated hearing aforesaid.

The findings of May 2, 1939, referred to at page 5 of the petition here, when made, were not intended to have anything whatsoever to do with the issues arising under the petition of the Court Trustee against The Arlington, Inc. They were made merely in relation to the Court Trustee's counterclaim against the Indenture Trustee. It was not until June 30, 1939, that the trial court in any way disposed of the issues raised by the petition against The Arlington, Inc., and in its order dismissing the petition against The Arlington, Inc., it incorporated the prior findings of fact made, not against The Arlington, Inc., but against City National Bank and Trust Company (R. 59).

Such of those findings as the Court Trustee considers material are set forth at pages 5 and 6 of the petition here, but none of them establishes any liability against The Arlington, Inc.

From the order of dismissal the Court Trustee filed his notice of appeal which expressly recites that the appeal is taken "to reverse the dismissal order and to obtain a judgment against The Arlington, Inc., a corporation, for $24,148, plus interest and costs" (R. 60).

II.

IN THE CIRCUIT COURT OF APPEALS.

Here again the failure on the part of the Court Trustee fully and accurately to state the facts tends to mislead the court as to the precise occurrences.

We have noted above that the hearing of the issues arising on the Court Trustee's petition against The Arlington, Inc. was consolidated with the hearings on other issues between him and other parties. The evidence as reported was certified to by the trial judge and the transcript was filed and made part of the record. Accordingly, the certificate of evidence was entire. It was natural, therefore, that we should move for the consolidation of this appeal with the others mentioned by the Court Trustee. Whether the motion for consolidation was or was not to be granted was merely an administrative question having to do with the expedition of the business of the Court of Appeals. And it is true that at an early stage, without further knowledge, the Court of Appeals denied the motion to consolidate, but the statement at page 7 of the Court Trustee's brief that on November 27, 1939, the court of appeals ordered that both parties might refer to the record of the other appeal cases, while literally true, is quite inadequate and misleading, for the fact is that the court of appeals ordered that the transcript of evidence above mentioned *be incorporated as part of the record* on the Court Trustee's appeal in this Arlington matter (R. 82).

And misleading, also, is the Court Trustee's statement at the bottom of page 7 of his petition that the latter order permitted The Arlington, Inc. to use in the matter of the Arlington appeal "the transcript of record in an entirely different case between other and different par-

ties, which parties did not include The Arlington, Inc." In view of the fact that all of the issues were consolidated for hearing before the trial court and all of the evidence taken was to be considered in respect of all the issues, how can the Court Trustee say that the transcript of record was in an "entirely different case, between other and different parties, which parties did not include The Arlington, Inc." (R. 59, 70, 72, 76).

The fact is that when he took the appeal the Court Trustee thought that the six findings mentioned at pages 5 and 6 of his petition here established the liability of The Arlington, Inc., and that therefore the trial court's order dismissing his petition against The Arlington, Inc. was erroneous. So on the appeal he was interested in having before the court of appeals only the findings and the order of dismissal, but not the evidence which, if there, would show that the findings were unwarranted.

The basic complaint of the Court Trustee is that the court of appeals on motion incorporated into the record on the Arlington appeal the certificate of evidence which had not been designated in the "praecipe" for record. The fact is that long before the enactment of the Rules of Civil Procedure the courts of appeals had inherent power to have certified up any part of the record which might tend to support the order of the trial court or which might be material to a consideration of the questions presented on appeal.

And Rule 75(h) is merely declaratory of this principle, for it recognizes that where any material part of the record has been omitted through error or inadvertence it may be supplied either on motion of the parties or on the motion of the court of appeals itself. What then does the Court Trustee mean when he says "we find no power for such an order"?

While it is true that at the earlier stages of the proceed-

ing the court of appeals was not in a position to determine that the various appeals mentioned in the petition here should be consolidated, nevertheless, after having set all of the matters for oral argument on the same day and upon the coming in and consideration of the respective briefs and the hearing and consideration of the oral arguments, the Court of Appeals then decided that all of the matters might most appropriately be disposed of in one opinion. And why not? They were all heard together below, and beyond that their disposition in one opinion is again a purely administrative matter, wholly within the control and discretion of the court of appeals.

In response to the Court Trustee's contentions (page 9, his petition) that the court of appeals thereby found itself in a "plight" and that it failed thoroughly and minutely to examine the record, it is unnecessary to do more than to refer to the opinion of that court, in which the court says:

> "The findings are of such serious character that we have read and re-read them and searched the record, with a view of endeavoring to ascertain if they find support. Although the result of this litigation must necessarily depend upon such determination, we have received only meager assistance from the Court Trustee. Instead of giving us references to the record which support the findings, the trustee is content to consume 28 pages of his brief with a verbatim copy of such findings. He then assumes that they are supported, and predicates his argument upon such assumption" (R. 87).

In the light of this statement, what right has the Court Trustee to assume and represent that the court of appeals failed adequately to examine the record to determine whether or not the fact findings were supported?

"FACTUAL MATTERS PRESENTED IN THE RECORD, WHICH WERE UNCONTESTED AND ADMITTED, BUT WHICH THE OPINION OF THE CIRCUIT COURT OF APPEALS OVERLOOKED OR IGNORED."

As to "Omission Number One", page 9 of the petition.

Notwithstanding the finding of the trial court that the Barton contract remains in force at this time, the court of appeals, after full review of the evidence, found in effect that that contract was not in force but rather that the owner corporations has reached a new agreement (R. 93). And of course it is not true that the assertions made by the Court Trustee in respect of that contract were "uncontested and admitted." On the contrary the point was one in issue before the court of appeals. And having determined, as it did at Record 93, that a new agreement had been made not by the "dual trustee" but by the owner corporations, the court of appeals at Record 98 said:

> "The argument here on behalf of the court trustee is predicated upon the same findings of fact (so far as material) as those upon which it was sought to hold City National liable. We have concluded those findings were without substantial support and for that reason City National should not be required to account in the matter. We also conclude that there is no liability on the part of Arlington, Inc."

This after reading, re-reading, and searching the record with a view of endeavoring to ascertain if the trial court's findings were in any way supported (R. 87).

As to "Omission Number Two", page 10, the petition here—

The petition filed by the Court Trustee against The Arlington, Inc., as we have pointed out above, did not charge that City National Bank and Trust Company acted in a dual capacity, etc. It merely averred that the Court Trustee had filed a counterclaim against City National in which

that averment was made. Of course The Arlington, Inc., could not deny and would have to admit, that the counterclaim contained such an averment, allthough it would be quite unprepared to admit as a fact that City National Bank and Trust Company of Chicago was either acting in a dual and conflicting capacity or that it had anything to do with the adjustment of the service charge which was in fact made by the two owner corporations.

But suppose that it were true that City National Bank and Trust Company, while mortgagee in possession after condition broken of the Granada, reduced the rates at which the Granada was to service the Arlington, and did so in breach of its trust as far as the Granada was concerned. How would that make The Arlington, Inc., liable to pay any more than it had contracted to pay City National Bank and Trust Company of Chicago, as mortgagee in possession of the Granada?

But the Court Trustee's argument here is not upon the merits of that question. His sole contention is that the Circuit Court of Appeals overlooked or ignored the issue raised on that point—which it plainly did not.

As to "Omission Number Three", page 12—

There is not a scintilla of evidence that the Indenture Trustee charged off on the books of the Granada a credit of $4,080,—and again this court is not given the benefit of any record reference to sustain the Court Trustee's statement. Indeed, the trial court's finding to this effect is found by the court of appeals to be contrary to the evidence (R. 93).

"The Two Principal Questions Presented."

Under this heading the Court Trustee says that the first question presented to this court is whether, after he had succeeded through our oversight in having transmitted to

the court of appeals merely the findings of the lower court and an order alleged to be at variance with those findings, we were not precluded from having the evidence on which the findings were predicated incorporated in the record, and, if not precluded, whether we followed the proper procedure in having the evidence made a part of the record. The second principal question presented, he says, is whether the Circuit Court of Appeals may reverse and overrule the findings of fact of the trial court without looking at the evidence upon which those findings were made. In other words, the Court Trustee's whole complaint is that the Circuit Court of Appeals should not have had the right to look at the evidence, but, having insisted upon that right, failed to look.

As to the Court Trustee's so-called "first question presented" we submit that the transcript of the testimony was properly included as a part of the record in this appeal pursuant to the provisions of Rule 75(h). As heretofore pointed out, by order of the District Court the hearing on the Court Trustee's counterclaim was had at the same time as the hearing on fee petitions and the Indenture Trustee's claim, and the Court Trustee's claim against The Arlington (R. 59, 70, 72, 76). All the testimony taken in the lower court was therefore a part of the record in this very case. The *original* of that transcript of testimony had already been transmitted to the Clerk of the Circuit Court of Appeals pursuant to court order in an appeal taken by the Indenture Trustee, the Committee, and their attorneys. The court therefore was strictly following Rule 75(h) when, pursuant to the prayer of our petition, it directed that the transcript of the testimony already in the custody of the Clerk of the Circuit Court of Appeals be incorporated in and made a part of the record on this appeal. In view of that fact the Court Trustee's statement that "obviously a consolidation of different records in different appeals,

between different parties, is not covered by this provision" (that is, Rules 75(h)) is totally unwarranted. There was no consolidation of different records.

Moreover, the courts of appeal have the same inherent power as this court on their own motion to require that there be certified up any matter germane to a consideration of the questions presented. *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 44 S. C. T. 560, 564, and *Wright* v. *McLaury*, 81 Fed. (2d) 96, 99 (C. C. A. 7).

These cases are also authority for the point that, without taking a cross appeal, we could attack the findings by reference to the evidence in order to support the order of dismissal.

Under the "Second Principal Question Presented" the Court Trustee says that at pages 9 to 13 of his petition he has noted how the Circuit Court of Appeals ignored or overlooked many central and controlling facts upon which the findings of fact of the District Court were based. We have heretofore discussed the so-called three omissions set forth by the Court Trustee at those pages of his petition, and have shown that the opinion of the Circuit Court of Appeals did not overlook anything but that on the contrary the court painstakingly went through the entire record to see if the findings had any support in the evidence, and this without the Court Trustee's assistance in pointing out where the evidence to support the findings was to be found in the record.

In this petition the Court Trustee has given this court an even greater task and less assistance. Not only has he failed to point out wherein the findings are supported by the evidence, but he has failed to have printed as a part of the record for the use of this court the evidence to support those findings, although it has been sent up to this court and, as shown by the certificate of the Clerk

of the Circuit Court of Appeals, is a part of the record in this case and was considered by the Circuit Court of Appeals in rendering its decision (R. 65).

That evidence, as shown by the certificate of the Clerk at Record 65, was before the Court of Appeals in printed narrative form in the matter of the main appeals 6986 and 7060, which were heard at the same time. It is contained in the printed volumes I and II which accompanied the separate petition for certiorari filed by the Court Trustee June 25, 1940, docketed here as numbers 281 and 282. Reference to the printed record docketed here as 281 and 282 will show that the very findings on which the Court Trustee relies were appealed from. There we had, and maintained, the burden of showing that those findings were clearly erroneous within the meaning of Rule 52 of the Rules of Civil Procedure, and thus it was that they were set aside by the Court of Appeals. We need not again assume that burden here, for the Court Trustee has the affirmative duty to show that the findings so set aside were not clearly erroneous.

"Reasons Relied Upon for the Allowance of the Writ."

The five reasons specified by the Court Trustee for the allowance of the writ are merely a resumé of the points presented in the prior portions of his petition, and have been fully answered.

Moreover, none of the reasons assigned for the allowance of the writ, either under this heading or in the conclusion, page 20 of the Court Trustee's petition, are reasons specified in Rule 38 of this court for the allowance of writs of certiorari.

WHEREFORE, the Respondent asks that the petition for the writ of certiorari be denied.

THE ARLINGTON, INC.,
By VINCENT O'BRIEN,
JOHN MERRILL BAKER,
TRACY WILSON BUCKINGHAM,
Its Counsel.